

IN THE
Court of Appeal of the State of California

IN AND FOR THE
Fifth Appellate District

STANDING ORDER NO. 04-1
As Modified August 11, 2004

THE COURT:

Pending opinions by the California Supreme Court in *People v. Towne* (review granted Jul. 14, 2004, S125677), and *People v. Black* (review granted Jul. 28, 2004, S126182), if appellate counsel wishes to raise any issue presented by *Blakely v. Washington* (2004) 542 U.S. ___, [124 S.Ct. 2531, 159 L.Ed.2d 403], he or she may file a letter consistent in form with the attached “Supplemental Argument Pursuant to Standing Order No. 04-1,” thereby preserving the issues for further state and federal review. Counsel need not file an application for leave to file the supplemental statement.

The People, through the Attorney General, need not file a response to the letter statement and the court will deem the stated issues to be opposed by the People.

The Court may request further briefing in any case. Upon a showing of good cause, the Court will accept motions for supplemental briefing to address *Blakely* issues not raised in *Towne* and *Black*.

This order does not apply to any pending appeal in which this court has ordered or authorized specific briefing on a *Blakely* issue.

The purpose of this order is to ensure that the subject issues will be raised and preserved for review in an efficient manner.

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Supplemental Argument Pursuant to Standing Order NO. 04-1

In the trial court, Mr. _____ was sentenced to an upper term of 11 years in state prison for violation of Penal Code section 192 and four years, consecutive, pursuant to Penal Code section 12022.5. In imposing the upper term, the court cited the following factors: “This is a crime of callousness, great bodily harm done, manner in which the crime is carried out shows planning, sophistication and professionalism. He engaged in violent conduct. He is a known gang member or he admitted to that even though he disputes that. [Para.] This is a crime involving separate acts of violence or threats of violence, they outweigh any of the mitigation of his youth or lack of prior records. And the fact that he voluntarily acknowledged wrongdoing prior to that in the matter that he was carrying a firearm. [sic] [Para.] He willfully engaged in the violent encounter. That as a part of this he left the scene, he attempted to flee the area. Furthermore, that he tried to dispose of the weapon.”

These factors were neither found by a jury nor admitted by virtue of Mr. _____’s no contest plea. As a consequence, Mr. _____ was denied his Sixth Amendment right to a jury trial and proof beyond a reasonable doubt of the aggravating factors utilized to impose a sentence greater than the statutory maximum of the six-year middle term. (U.S. Const., Amends. V, VI, XIV; *Blakely v. Washington* (No. 02-1632, June 24, 2004) 524 U.S. _____, 2004 WL 1402697, 2004 DJDAR 7581; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) Counsel notes that this issue is pending in the California Supreme Court. (*People v. Towne*, review granted 7/14/04, S125677; *People v. Black*, review granted 8/2/04, S126182.)

Pursuant to this Court’s standing order no. 04-1, dated August 11, 2004, appellant raises this issue.

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